No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a U.S. Army Corps of Engineers determination that certain property contains "waters of the United States" protected by the Clean Water Act constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and is therefore subject to judicial review under the Administrative Procedure Act.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case concerns Cato because it implicates property rights, which are an essential element of a free society.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has applied a two-part analysis when determining the "finality" of an agency action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). This analysis requires: (1) Examining whether the agency action is the "consummation" of the agency's decision-making process rather than being merely tentative or interlocutory in nature. *Id.* at 178 (citations omitted); and (2) inquiring whether the agency action is one in which rights or obligations have been determined, or from which legal consequences will flow. *Id.*

This Court should abandon the second prong of the *Bennett* finality analysis. Prong II is rooted in

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief; the parties' letters granting blanket consent to *amicus* briefs have been lodged with the Clerk. No counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus* made a monetary contribution to fund its preparation or submission.

federal common law and is incompatible with the presumption of judicial review under the Administrative Procedure Act (APA). Further, the question of whether an agency action has become final should be answered by analyzing the text and structure of the APA in order to determine the statute's plain meaning. Under that statutorily faithful test, a jurisdictional determination under the Clean Water Act is clearly a final agency action.

ARGUMENT

I. PRONG II OF THE *BENNETT* FINALITY ANALYSIS VIOLATES THE ADMINISTRATIVE PROCEDURE ACT'S PRESUMPTION OF JUDICIAL REVIEW

The APA's text, structure, and history—confirmed by this Court's precedents—make clear that Congress intended a strong presumption of reviewability when analyzing jurisdiction under the APA. *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012); *Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967). Any interpretation of final agency action that requires more than the plain meaning of the APA's text is inconsistent with that presumption. Prong II of the *Bennett* analysis does just that. The test the Court applied in *Bennett* was based on federal common law having its roots—at least as to prong II—in Article III standing, not in the text of the APA. Requiring a prudential test for the effects of an agency's action on top of the minimum standing requirements already addressed in 5 U.S.C. § 702 is burdensome and inconsistent with the APA's presumption of judicial review.

A. The APA Creates a Presumption of Judicial Review of Agency Action

This Court has long recognized that the APA "embodies the basic presumption of judicial review to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Abbott Labs.*, 387 U.S. at 140 (citations and internal quotation marks omitted). This presumption extends to "review of final agency action for which there is not other adequate remedy in court." *Id.*; *see also, Sackett*, 132 S. Ct. at 1373 ("The APA, we have said, creates a presumption favoring judicial review of administrative action[.]" (citations and internal quotation omitted). This presumption should not be overcome unless there is a showing of "clear and convincing evidence" to the contrary. *Abbott Labs*, 387 U.S. at 140.

This presumption is supported by the legislative history of the APA, which "manifests a congressional intention that [the APA] cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the APA's generous review provisions must be given a hospitable interpretation." *Id.* at 140–141 (citations and internal quotation marks omitted); *see also*, *Califano v. Sanders*, 430 U.S. 99, 104 (1977) (noting "Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.").

The presumption of judicial review predates the APA. Indeed, "federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (quoting *Bowen v. Mich.*

Academy of Family Physicians, 476 U.S. 667, 670 (1986)). As Chief Justice Marshall explained in 1835:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 34 U.S. 8, 28-29 (1835). *See also, Gutierrez de Martinez*, 515 U.S. at 424–25 (1995) ("judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'") (citing *Abbott Labs*, 387 U.S. at 140).

The text, structure, and history of the APA demand that any statutory construction of 5 U.S.C. § 704 be seen through the lens of a presumption of reviewability. But that is not how the precedent has treated review of final agency action; instead, the Court has accepted a common-law view inhospitable to regulated parties. In the words of one expert:

> *Bennett* severely restricts judicial review in cases where parties are, in any honest assessment of the wording of the APA, aggrieved. Too frequently, the judicial system denies this basic entitlement—

> despite the apparent intent of the APA—to those needing the independent and objective review that only a court can provide.

Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 Admin. L. Rev. 371, 402 (2008).

B. Prong II of the *Bennett* Finality Analysis Is Based on a Common-Law Standing Requirement, Not the APA's Text

The APA already provides for the inquiry into the requisite injury required by Article III to trigger judicial review: "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702; *see also, Doe v. Chao*, 540 U.S. 614, 624-25, (2004) (noting that § 702 "provid[es] review of agency action under the Administrative Procedure Act to individuals who have been adversely affected or aggrieved. That is, an individual subjected to an adverse effect has injury enough to open the courthouse door."); *Ass'n of Data Processing Serv. Orgs, Inc. v. Camp*, 397 U.S. 150 (1970) (connecting § 702 with Article III standing requirements).

But since its enactment in 1946, statutory construction of the APA has been pervaded by judge-made federal common law. *See* Kenneth Culp Davis, *Admin. Law Treatise* 2:18, at 140 (2d ed. 1978); *see also*, Louis L. Jaffe, *Judicial Control of Admin. Action* 329 (1965) (noting that a significant part of judicial review of administrative law comes from common law). In other cases, the APA has simply been ignored. As Prof. Davis noted: "[p]erhaps about nine-

tenths of American administrative law is judge-made law, and the other tenth is statutory Most of it is common law in every sense, that is, it is law made by judges in absence of relevant constitutional or statutory provision." Davis, *supra*, at 140.

In *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939)—a pre-APA holding overruling the "negative" orders doctrine—a telephone company petitioned for review of an order by the Federal Communications Commission. The order classified the company as an interstate carrier subjecting it to certain requirements under the common carrier provisions of the Communications Act of 1934. *Id.* at 127–28. The Court ultimately held that the FCC order re was a final agency action because it was not "a mere abstract declaration regarding the status of the [challenger] under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication." *Id.* at 143. The common-law rationale for the analysis of finality adopted in *Bennett* was described by Justice Frankfurter:

> Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. III, § 2, U.S. Constitution. Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since

> the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding.

Id. at 131.

Here we see the common-law roots of the *Bennett* finality test. *Bennett*'s first prong of *Bennett* is seen in *Rochester*'s second factor, that the Court is "loath to authorize review of interim steps in a proceeding." *Id.* The second prong comes from considerations of Article III's grant of "judicial power" to determine "Cases" and "Controversies." In other words, the Court must consider whether there is an injury by the agency that gives the Court standing to hear the case. *Id.* Or, as the *Bennett* analysis puts it, "consummation" of the agency's decisionmaking process and whether the action is merely tentative or interlocutory in nature. *Bennett*, 520 U.S. at 178.

Later decisions citing *Rochester* seem to have misread the holding as including two distinct prongs of analysis for final agency action, rather than seeing it for what it was: an Article III standing requirement testing the action's effect coupled with an inquiry into its timing. Unfortunately, most cases citing *Rochester*—including *Bennett*—have given cursory considerations to this precedent by merely citing the case for the later rule. *See, e.g.*, *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (under APA, a relevant consideration in determining finality is whether "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action") (citations omitted); *Pennsyl-*

vania R.R. v. United States, 363 U.S. 202 (1960) ("We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable.") (citations omitted).

The APA's strong presumption of reviewability must enter into any analysis the Court conducts into determining what is a final agency action. If *Bennett*'s second prong is rooted in standing then it is putting a duplicative burden on the aggrieved party to get into court. This runs against the APA's presumption of judicial review. Indeed, if the analysis of what constitutes final agency action requires more than the plain language of the statute, it creates a paradox: The APA favors judicial review of agency action, yet the regulated party must overcome a burdensome prudential federal-common-law standard.

When the Court analyzes whether the agency action determines rights or obligations—or whether legal consequences flow from it—it is really inquiring into whether the aggrieved party has suffered an injury—an inquiry relevant to APA § 702—not any distinct effect produced by the agency action's finality.

II. THIS COURT SHOULD ABANDON *BENNETT*'S PRONG II, APPLY THE PLAIN-MEANING RULE TO THE APA, AND FIND A "FINAL AGENCY ACTION" HERE

A. The Statutory Text Itself Provides a Pragmatic, Straightforward Way to Analyze § 704 of the APA

Amicus fully agrees with the Eight Circuit's holding that "a properly pragmatic analysis of final

agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review." *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1002 (8th Cir. 2015). A straightforward application of the APA's text would be even more pragmatic—and in line with the APA's presumption of reviewability. Applying this approach, the agency action need only be final; it would not require a second burden with no foundation in statutory language.

The first step in an appropriate analysis would be to determine how the APA defines "agency action." While the APA does not clearly define the whole term "*final* agency action," it does define "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The APA in turn defines what each of these separate actions entail. See 5 U.S.C. § 551(4)-(12). Therefore, the first step would be to ask whether the action taken by an agency would fall into one of the above categories.

Second, it may be necessary in some cases to determine what an "agency" is. The APA definition of "agency" reads: "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia." 5 U.S.C. §§ 701(b)(1), 551(1). The office of the President is excluded. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) ("The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that

textual silence is not enough to subject the President to the provisions of the APA.").

Third, the analysis must turn to when an agency's action becomes final. Here, *Bennett*'s first prong is perfectly in line with a final agency action. Because the APA does not define what is final, the Court should look to the plain meaning of the statute. This Court has repeatedly held that "in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (citation, brackets, and internal quotation marks omitted); *see also, Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (noting that the plain-meaning rule is a "fundamental canon of statutory construction"); *see also*, e.g., *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (applying the plain-meaning rule); *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (same); *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (same). The ordinary meaning of a statutory term can typically be determined by reference to its dictionary definition. *See, e.g., Octane Fitness*, 134 S. Ct. at 1756; *Burrage*, 134 S. Ct. at 887

Webster's dictionary defines "final" as: happening or coming at the end; happening as a result: happening at the end of a process." *Webster's Third New International Dictionary* (2002). This definition parallels *Bennett*'s first prong: the action must mark the consummation of the agency's decision making process, not be merely tentative or interlocutory in nature. *Bennett*, 520 U.S. at 177–78.

Accordingly, a proper judicial review of whether an agency action is final under APA § 704 would

evaluate: (1) whether the agency action falls under the statutory definition of "agency action" under 5 USCS § 551(13); (2) whether the government entity was in fact an agency within the meaning of 5 U.S.C. §, 551(1); and (3) whether the agencies is the "consummation" of the agency's decisionmaking process and not merely tentative or interlocutory in nature.

B. A Jurisdictional Determination Constitutes a "Final Agency Action" Under the Plain Meaning of the APA

Under a textual analysis of APA § 704, a Jurisdictional Determination (JD) is clearly a "final agency action." The U.S. Army Corps of Engineers is an agency within the meaning of 5 U.S.C. § 551(1) as an authority of the U.S. government and does not fall within any of the statutory exceptions.

The JD also is an agency action marking the consummation of the agency decisionmaking process. Petitioners concede in their brief that the first prong of *Bennett* is met. *See* Pet. Brief 25-26. In addition, as Petitioners point out, the Code of Federal Regulations confirms: "A JD is agency determinations for which administrative appeals have been completed represent the consummation of the Corps' decision-making with respect to the presence of waters of the United States on particular property, and reflects the agency's official view." *Id.* (citations omitted).

All three circuit courts—as well as every other district court—to address whether a JD marks the consummation of agency action have agreed that it does. *See Hawkes Co.*, 782 F.3d at 999 (holding that the revised JD "clearly meets the first *Bennett* factor—it was the consummation of the Corps' decisionmaking process on the threshold issue of the

agency's statutory authority") (citations omitted); *Belle Co., L.L.C. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 390 (5th Cir. 2014) (concluding that the JD marks the consummation of Corps decisionmaking process as to the question of jurisdiction); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008) (holding that JD marks consummation of agency decisionmaking process because the Corps "has asserted its ultimate administrative position regarding the presence of wetlands on Fairbanks' property on the factual circumstances upon which the determination is predicated").

Taking this pragmatic straightforward approach of analyzing the plain meaning of the APA's text makes this an easy case. When the Corps issued the JD at issue here, it was a final statement of its position on whether the property owner would be subject to the CWA. When a property owner receives this determination, she should be able to obtain judicial review without having to overcome a burdensome common-law standard that is inapposite to the APA's presumption of judicial review.

CONCLUSION

This Court should affirm the court below.

Respectfully,

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